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Agenda item 10 (a)

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the sessional working group on the administration of justice and the question of compensation

Chairman-Rapporteur: Mrs. Claire Palley

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Introduction

1. At its 3rd meeting, on 2 August 1994, the Sub-Commission decided, without a vote, to establish a sessional working group on the administration of justice and the question of compensation. The existing regional groups within the Sub-Commission nominated the following experts as members of the working group, and they were duly appointed on 2 August 1994: Mr. José Bengoa (Latin America), Mr. Stanislav Chernichenko (Eastern Europe), Mrs. Lucy Gwanmesia (Africa), Mr. Mohammed Sardar Ali Khan (Asia) and Mrs. Claire Palley (Western European and other States).

2. The working group held three meetings, on 3, 8 and 11 August 1994.

3. The session was opened by a representative of the Assistant Secretary-General for Human Rights.

4. At the proposal of Mr. Chernichenko, the working group elected Mrs. Claire Palley as Chairman-Rapporteur for its 1994 session.

5. The following members of the Sub-Commission who are not members of the working group also took part in the discussion: Mr. Miguel Alfonso Martínez (1st and 2nd meetings), Mr. El-Hadji Guissé (2nd meeting), Mr. Louis Joinet (1st and 2nd meetings), Mrs. Halima Embarek Warzazi (1st and 2nd meetings) and Mr. Shukong Zhong* (1st and 2nd meetings).

6. At the invitation of the working group, Mr. Theo van Boven, Special Rapporteur of the Sub-Commission on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights, also participated in the discussion on the relevant item of the agenda.

7. Statements were made by representatives of the following non-governmental organizations in consultative status with the Economic and Social Council: International Commission of Jurists (1st meeting), International Federation of University Women (2nd meeting).

8. The working group had before it the following documents relating to its provisional agenda:

Report of the Secretary-General prepared pursuant to Sub-Commission resolution 1993/29, (E/CN.4/Sub.2/1994/7 and Add.1);

Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report submitted by Mr. Theo van Boven, Special Rapporteur (E/CN.4/Sub.2/1993/8);

Report of the Working Group on Detention on its 1993 session (E/CN.4/Sub.2/1993/22 and Corr.1);

Provisional agenda (E/CN.4/Sub.2/1994/WG.1/L.1);

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* Alternate.

Note by the secretariat concerning coordination between the programme of human rights in the administration of justice and the programme of crime prevention and criminal justice (E/CN.4/Sub.2/1994/WG.1/CRP.1);

The Death Penalty, document submitted by Amnesty International (E/CN.4/Sub.2/1994/WG.1/CRP.2);

Human Rights and Pre-trial Detention: A Handbook of International Standards relating to Pre-trial Detention (HR/P/PT/3);

Convention on the Prevention and Punishment of the Crime of Genocide (General Assembly resolution 260 A (III) of 9 December 1948).

Adoption of the agenda

9. At its 1st meeting, the working group considered the provisional agenda contained in document E/CN.4/Sub.2/1994/WG.1/L.1 and decided to review it in the light of the establishment of the working group with the title "sessional working group on the administration of justice and the question of compensation".

10. Mr. Joinet suggested - and the working group agreed - to defer item 3 concerning habeas corpus as a non-derogable right and as one of the requirements of the right to a fair trial to the next session of the working group in order to take into account the final report prepared by Mr. Chernichenko and Mr. Treat on the right to a fair trial (E/CN.4/Sub.2/1994/24), as well as Mr. L. Despouy's seventh revised annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency (E/CN.4/Sub.2/1994/23), in particular its chapter I relating to the question of inalienable or non-derogable rights. Mrs. Palley supported this on the additional grounds that it was necessary to take into account the opinion expressed in the Human Rights Committee's recent report that singling out habeas corpus as a non-derogable right might have adverse effects on fair trial.

11. Concerning item 4, she inquired as to whether the item would be accompanied by material indicating which States imposed the death penalty for offences other than one causing the death of a victim.

12. Concerning the item entitled "Juvenile justice", the secretariat informed the working group that a meeting of experts on the "Application of international standards concerning the human rights of detained juveniles", was to be held at Vienna in October/November 1994. As a result, Mr. Joinet proposed, and the working group agreed, to defer this item to the next session in order to consider the deliberations and recommendations of this meeting.

13. Referring to item 6 of the provisional agenda, Mr. Joinet suggested the preparation of a working paper on the follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance for the next session of the working group; he therefore proposed to defer the item to the 1995

session of the group. The working group agreed with the proposal and requested Mr. Joinet to draft a working paper on the subject for consideration by the working group at its next session.

14. On the proposal of Mrs. Palley and Mrs. Warzazi, the group decided to include a new item entitled "Mechanism for implementation of the Convention on the Prevention and Punishment of the Crime of Genocide".

15. On the proposal of Mrs. Palley, the working group decided to include a new item entitled "Basic principles and guidelines concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", divided into the following three sub-items: (a) General principles; (b) Forms of reparation; (c) Procedures and mechanisms.

16. Also on the proposal of Mrs. Palley, the working group decided to include a further item entitled "Matters arising from the 1993 report of the working group".

17. The working group decided to adopt the following agenda as revised:

1. Election of officers.

2. Adoption of the agenda.

3. Basic principles and guidelines concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms:

   (a) General principles;

   (b) Forms of reparation;

   (c) Procedures and mechanisms.

4. Issues related to the deprivation of the right to life, with special reference to:

   (a) Imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled;

   (b) Questions relating to summary, arbitrary and extrajudicial executions.

5. Mechanism for implementation of the Convention on the Prevention and Punishment of the Crime of Genocide.

6. Analysis of the work of the Sub-Commission and of the Commission on Crime Prevention and Criminal Justice, with a view to improving coordination.

7. Matters arising from the 1993 report of the working group.

8. Provisional agenda for the next session.

9. Adoption of the report of the working group to the Sub-Commission.

I. BASIC PRINCIPLES AND GUIDELINES CONCERNING THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: (a) GENERAL PRINCIPLES

18. In response to the request made by the Sub-Commission in paragraph 5 of its resolution 1993/29 to examine further the proposed basic principles and guidelines included in the study at its forty-sixth session and, for that purpose, to establish if necessary a sessional working group at that session, the working group discussed the principles and guidelines proposed by the Special Rapporteur, Mr. Theo van Boven, in his study on the subject (E/CN.4/Sub.2/1993/8, chap. IX).

19. Mr. van Boven elucidated the set of basic principles and guidelines drawn up by him on the basis of his study and in the light of the deliberations at the Seminar on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, held from 11 to 15 March 1992 at the University of Limbourg, Maastricht, the Netherlands. In particular, he suggested giving priority to the general principles and proposed that both governmental and non-governmental organizations study them in detail. The members of the working group and other experts agreed to his proposal and began consideration of the general principles. They also expressed appreciation for the comprehensive report submitted by the Special Rapporteur.

20. With regard to Principle 1, it was emphasized that the right of reparation for victims of gross violations of human rights and fundamental freedoms should be based on the principles of international law, which recognize such a right and should constitute the legal basis for this set of guidelines. In the opinion of some participants, the list of gross violations of human rights and fundamental freedoms set forth in Principle 1 includes principles of different natures and values. In that connection, it was proposed to make this list dependent upon the gravity of the violations.

21. Mr. Alfonso Martínez commented on the text submitted by the Special Rapporteur in Principles 1, 3 and 6. With respect to Principle 1, he stated that he understood the term arbitrary "detention" as referring to the situation of prisoners deprived of liberty and awaiting trial or final sentencing, as opposed to the situation of "imprisonment", which related to deprivation of liberty after final sentencing. He requested that the Special Rapporteur confirm whether such an interpretation was correct and consistent with United Nations terminology on that subject, stressing that eventual compensation should be available for both situations. This could be solved by using the following wording: "arbitrary detention or imprisonment".

22. Mr. Joinet proposed to replace the terms "arbitrary and prolonged detention" by the terms "arbitrary deprivation of freedom when of a grave nature". In his opinion, such "grave nature" referred particularly to the placing of mentally ill persons in mental health facilities without the informed consent of the families or legal counsel.

23. Mr. van Boven pointed out that the term "arbitrary" had been discussed at length during the drafting of the Universal Declaration of Human Rights. It was included in the Declaration and in the International Covenant on Civil and Political Rights, and had been used and interpreted in case law. However, the words "arbitrary deprivation of freedom" do not indicate the duration of the detention. He also indicated that, in fact, the word "detention" was used in Principle 1, as suggested by Mr. Alfonso Martínez, in the sense of this term according to the United Nations document on the subject. Therefore, it might be advisable to use the term "prolonged arbitrary deprivation of freedom".

24. Mr. Chernichenko suggested that the detailed principles should not be drafted now; they could be elaborated as part of other instruments, for instance as part of a convention. For the moment, only minimal changes should be made.

25. At the end of consideration of the list of violations, Mr. Zhang supported the proposal of Uruguay, contained in document E/CN.4/Sub.2/1994/7, that Principle 1 should simply state that under international law, violation of human rights gave rise to reparation for victims and that it should not also contain a list of specific violations, as suggested by Mr. van Boven. However, Mr. van Boven, as well as other members, preferred retaining the list.

26. Regarding Principle 2, it was pointed out that since the proposed guidelines dealt with reparation for gross violations of human rights, a clearer distinction could be made between those fundamental tenets which were applicable to breaches of each and every human right, and to the principles dealing specifically with the consequences of gross violations of human rights. Referring to Sweden's reply, contained in document E/CN.4/Sub.2/1994/7, it was pointed out that it might also be useful to clarify the implications of State responsibility for the provision of reparation, i.e. on which entities the obligation to provide reparation devolved.

27. In the opinion of Mr. Joinet, a State should guarantee that a person responsible for gross violations of human rights will not have immunity from liability for his/her action.

28. With regard to Principle 3, Mr. Alfonso Martínez pointed out that the terms "wrongful acts" did not constitute a legal term and suggested to use in this principle the word "arbitrary", for the sake of consistency with Principle 1. Mr. van Boven agreed, but justified its use by the fact that this term was widely used by the International Law Commission in connection with its examination of the subject of State responsibility. Mrs. Palley explained that "wrongful acts" was the technically correct category to describe both criminal and delictual (tortious) acts.

29. In connection with Principle 4, Mr. Joinet suggested deleting the words "and wishes"; inserting before the word "needs" the words "material and moral"; and inserting after the word "réadaptation" in the French text, the words "la réhabilitation". In addition, he proposed to add at the end of the principle the following words: "et l'obligation de poursuivre et juger ses auteurs". He also doubted if the term "satisfaction" was a legal term. Mr. Joinet was of the opinion that any human rights violation should inevitably involve compensation and the authors of the violations should be prosecuted. This should be clearly stated in Principle 4.

30. Mrs. Palley pointed out that, in his report on the human rights dimensions of population transfer (E/CN.4/Sub.2/1994/18, paras. 110-111), Mr. Al-Khasawneh explained the international law remedy of "satisfaction", which was an exceptional remedy, seriously affecting the domestic jurisdiction of the wrongdoing State, while, arguably, the responsibility relationship is still delictual and not criminal - even when "satisfaction" is provided for as a remedy. Paragraph 110 explained that satisfaction may take a number of forms: an apology, nominal damages, damages reflecting the gravity of the injury and disciplinary action and/or punishment of officials or private persons when the wrongful act arises from serious misconduct of private persons or criminal conduct by officials. She also referred to paragraph 94 of this report, in which the Special Rapporteur expressed the opinion that it was unfortunate that too wide a discretion should be left to an injured State to decide on whether to substitute restitution in kind by reparation, by equivalent (compensation). Such a discretion would, in practice, mean that the provision would work in favour of the rich and strong, to the detriment of the weak and poor.

31. Mr. van Boven, referring to these remarks and to the reply of Sweden, agreed that the wishes of the victim, although an important factor to be taken into account when according reparation, should not, in themselves, be binding in the determination of that reparation. He also agreed that, at the same time, no victim of human rights violations should be forced or coerced into accepting a form of reparation against his or her will. In his opinion, wishes alone should not prevail in the determination of reparation. As regards the term "satisfaction", he referred to paragraph 11 of the proposed principles and guidelines, setting out a variety of means by which satisfaction can be given to victims.

32. Regarding Principle 5, Mr. van Boven pointed out that a number of both universal and regional human rights instruments contained express provisions relating to reparation for damages. Those provisions were analysed in chapter II of his study.

33. Mr. Joinet was of the opinion that certain gross violations of human rights constituted crimes under international law, and no statutory limitations should apply to those crimes. In view of the above, he proposed that Principle 5 be reworded as follows:

> "Lorsqu'il s'agit de crimes en droit international, cette obligation est imprescriptible."

34. With reference to Principle 6, Mr. Alfonso Martínez considered it absolutely necessary to establish who could claim reparation, and to specify who could represent a victim. In his opinion, specific mention should be made of the victim's legal counsel's right to request such compensation.

35. Concerning Principle 7, Mr. van Boven stated that most of the gross violations listed in Principle 1 reflected individual and collective aspects. The coincidence of the two aspects was particularly manifest with regard to the rights of indigenous peoples, forced evictions, contemporary forms of slavery and environmental hazards.

36. Mrs. Palley was of the opinion that the notion of collective rights of action expressed in Principle 7 was a controversial one for some States. She also drew attention to the Swedish reply, which stated that the concept of collective human rights had not as yet received general acceptance in the international community.

37. On his part, Mr. Guissé supported the idea of collective rights embodied in Principle 7. In this connection, Mr. van Boven referred to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, in paragraphs 1 and 2 of which "victims" meant persons who, individually or collectively, had suffered damage. In this regard, he also recalled Sub-Commission resolution 1989/13 which, with respect to the question of who was entitled to reparation, mentioned in its first preambular paragraph "individuals, groups and communities".

38. The representative of the International Federation of University Women emphasized the importance of providing for reparation, compensation and rehabilitation to women and young girls. In particular, in her opinion, this referred to young girls whose arbitrary and prolonged detention could destroy their future.

39. The working group recommended continuing the analysis and consideration of the basic principles and guidelines at its next meeting, or at the meeting of a separate working group on the subject, if the Sub-Commission should decide to establish such a separate group.

II. ISSUES RELATED TO THE DEPRIVATION OF THE RIGHT TO LIFE, WITH SPECIAL REFERENCE TO: (a) IMPOSITION OF THE DEATH PENALTY ON PERSONS OF LESS THAN 18 YEARS OF AGE AND ON THE MENTALLY AND PHYSICALLY DISABLED; (b) QUESTIONS RELATING TO SUMMARY, ARBITRARY AND EXTRAJUDICIAL EXECUTIONS

40. A representative of the Centre for Human Rights elucidated the work of human rights treaty bodies relating to the death penalty. He drew the attention of the group to General Comment 6 adopted by the Human Rights Committee (HR/GEN/1, part I, p. 5) concerning implementation by States of the obligations under article 6 of the International Covenant on Civil and Political Rights. While it follows from article 6 (2) to (6) that States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use and to abolish it for other than the "most serious crimes". The article also refers generally to abolition in terms which strongly suggest that abolition is desirable. States' reports show that progress made

towards abolition or limiting the application of the death penalty is quite inadequate. He also drew attention to the opinion of the Committee that the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure. However, the Committee had not specified the notion of "most serious crimes".

41. In its General Comment 6, the Human Rights Committee also observed that the right to life enunciated in the first paragraph of article 6 of the Covenant is the supreme right from which no derogation is permitted, even in times of public emergency. Therefore, anyone sentenced to death should have the right to seek pardon or commutation of sentence, which might be granted.

42. Mrs. Gwanmesia pointed out the inability of some States to control the imposition of the death penalty. In some States the authorities use the death penalty as a means of political repression; in that regard, she emphasized the need to prevent the abuse of power by those authorities.

43. Mr. Joinet highlighted the difficulties of abolitionist States when presented with an application for extradition for acts which might attract the death penalty in the requesting State. For instance, it might occur that France could be requested to extradite a person to the United States, where he could face the death penalty in some States. It would be unfortunate if such a situation were to be used, for example, by mafia bosses for their impunity.

44. In reply to questions, the representative of the Centre for Human Rights explained that the Human Rights Committee considered communications from individuals under the Optional Protocol to the Covenant, a large number of which related to imposition of the death penalty. As the Committee's procedure in considering such communications was confidential, he described it only in general terms. In particular, he said that 130 to 140 such cases involving Caribbean States had been considered. For each case, the Committee appoints a special rapporteur from among its members, who may request the State to stay the execution of the complainant, in accordance with rule 86 of the Committee's rules of procedure. In the vast majority of cases, these requests had been granted.

45. The members of the group and other participants welcomed the supervisory activities of the Committee in the field. They pointed out that there was a worldwide tendency towards a considerable reduction in the number and categories of offences for which capital punishment might be imposed. They also noted with satisfaction a steady increase in ratifications and accessions to the Second Optional Protocol to the Covenant aiming at the abolition of the death penalty.

46. Members were of the view that capital punishment might be imposed only for the most serious crimes, and it might be imposed only for a crime for which the death penalty was prescribed by law at the time of its commission. In addition, anyone sentenced to death should have the right to appeal, and steps should be taken to ensure that such appeals become mandatory.

47. The working group recommended that the agenda item should be retained in the draft provisional agenda for the next session, and should keep its present formulation. Special attention should be given to the imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled. Further attention should be given to the work of human rights bodies, i.e. the Human Rights Committee and the Committee against Torture. For that purpose, the members requested the secretariat to draft a succinct conference room paper.

III. MECHANISM FOR IMPLEMENTATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

48. Mrs. Warzazi stated that it was significant that the Genocide Convention should be enforced and implemented. For that purpose, she intended to submit a draft resolution suggesting that an article be added to the Convention to establish a group of experts to study the implementation of the Convention and to submit a relevant report every two years. She considered it even more necessary because the International Tribunal for the prosecution of serious violations of international humanitarian law committed in the territory of the former Yugoslavia established pursuant to Security Council resolution 827 (1993) of 25 May 1993 had proven to be ineffective.

49. Mrs. Palley referred to the adoption by the International Law Commission at its forty-sixth session of a draft statute for an international criminal court or other international trial mechanisms to deal with crimes against the peace and security of mankind. She stated that with regard to genocide, a special provision applied whereby any State party to the statute, which was also a Contracting Party to the Genocide Convention, might lodge a complaint with the Prosecutor alleging that a crime of genocide appeared to have been committed. This was in conformity with article VI of the Convention. In that regard, she stated that the Court would have a sort of "inherent jurisdiction". Furthermore, totally independently from the acceptance of the Court's jurisdiction by any particular State, in accordance with article 23 of the draft statute the Security Council could, under Chapter VII of the Charter, refer to the Court.

50. Mr. Joinet supported Mrs. Warzazi's proposal. In his opinion, political genocide was a major problem in contemporary society and the group of experts should take this into account when drafting its report. Mrs. Warzazi agreed with Mr. Joinet's statement and said that a group of experts who had serious proof of acts of genocide should refer to the Secretary-General directly in order to undertake the necessary action.

51. Mr. Guissé stated that, at present, the list of acts of genocide was limited to acts relating to physical genocide, whereas it should include political and other acts of genocide. He considered that a revision of the Convention should be carried out, and that universal jurisdiction should be embodied in the Convention.

52. The working group welcomed the adoption of the draft statute for an international criminal court and other international trial mechanisms by the International Law Commission, and expressed its wish that the General Assembly should speedily consider the draft statute. The group also decided to

consider the issue at its next session and invited Mrs. Warzazi to prepare the relevant recommendations and requested Mr. Joinet to prepare a draft resolution, bearing in mind those considerations, for the present session of the Sub-Commission.

IV. ANALYSIS OF THE WORK OF THE SUB-COMMISSION AND OF THE COMMISSION ON CRIME PREVENTION AND CRIMINAL JUSTICE, WITH A VIEW TO IMPROVING COORDINATION

53. The group considered document E/CN.4/Sub.2/1994/WG.1/CRP.1 to be comprehensive and informative. Coordination of activities between the two programmes had moved from an empirical case-by-case principle to close cooperation, in particular in working out the implementation of some joint projects. In the view of the members of the group, the Sub-Commission should continue to coordinate its work with the activities of the Commission on Crime Prevention and Criminal Justice and with the United Nations Congresses on the Prevention of Crime and the Treatment of Offenders.

54. The representative of the International Federation of University Women, recalling the reference to matters concerning women and girl children contained in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights as well as in paragraphs 1-4, 7(c) and 17 of Commission resolution 1994/45, requested from the working group and the secretariat information on how they were contemplating the inclusion of the question concerning women and girl children.

55. The representative of the secretariat referred to Commission resolution 1994/45 and the adaption by the Commission on Crime Prevention and Criminal Justice, at its third session in 1994, of a resolution on violence against women and minors. Both resolutions called for intensified effort at the international level to integrate the equal status of women and the human rights of women into the mainstream of United Nations systemwide activity and to address those issues regularly and systematically throughout relevant United Nations bodies and mechanisms. The Special Rapporteur on violence against women had been appointed by the Commission.

V. PROVISIONAL AGENDA FOR THE NEXT SESSION

56. At its 2nd meeting, the Working Group adopted the following provisional agenda for its next session:

1. Election of officers.

2. Adoption of the agenda.

3. Follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance.

4. Habeas corpus as a non-derogable right and as one of the requirements for the right to a fair trial.

5. Basic principles and guidelines concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms:

   (a) General principles;

   (b) Forms of reparation;

   (c) Procedures and mechanisms.

6. Issues related to the deprivation of the right to life, with special reference to:

   (a) Imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled;

   (b) Questions relating to summary, arbitrary and extrajudicial executions.

7. Juvenile justice.

8. Matters arising from the 1994 report of the working group.

9. Provisional agenda for the next session.

10. Adoption of the report of the working group to the Sub-Commission.

VI. ADOPTION OF THE REPORT OF THE WORKING GROUP TO THE SUB-COMMISSION

57. At its 3rd meeting on 11 August 1994, the working group unanimously adopted the present report to the Sub-Commission.